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April 13 2010
Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 10-0092

IN THE MATTER OF:

T.H.,

A Youth in Need of Care.

BRIEF OF APPELLANT

On Appeal from the Montana Sixth Judicial District Court,
Park County, The Honorable Laurie McKinnon, Presiding

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b. The district court was required to hold a hearing on DPPHS' request for a finding that reunification efforts were not necessary *prior* to making such a finding.

2. The district court abused its discretion in terminating A.G.'s parental rights.

STATEMENT OF THE CASE

This is an appeal from the termination of a mother's parental rights to her daughter. On February 2, 2010, the Montana Sixth Judicial District, Park County, issued an order terminating A.G.'s parental rights to T.H. A.G. alleges that the district courted erred in finding that DPPHS was not required to make reasonable efforts and that she had subjected T.H. to aggravated circumstances, ultimately resulting in the termination of her parental rights. The record does not contain clear and convincing evidence to support those findings.

STATEMENT OF THE FACTS

This case was initiated on December 5, 2008, upon the filing of a Petition for Immediate Protection, Emergency Protective Services, for Adjudication as Youth in Need of Care and for Temporary Legal Custody. (D.C. Doc. 2.) On December 1, 2008, A.G. had arrived at the emergency room with T.H., then age four months, with concerns about T.H.'s right leg. An x-ray was performed, which revealed that T.H.'s right femur was broken. A body scan was ordered and three additional breaks were discovered (two ribs and clavicle). Neither A.G., or T.H.'s father, R.H., were able to provide an explanation for the injuries.

A show cause hearing was held on January 6, 2009. No testimony was provided and both parents stated on the record that they would stipulate to adjudication. (January 6, 2009 Hearing Transcript (1/6/09 Tr.) at 3.) No written stipulation or adjudicatory order was submitted. A dispositional hearing was set for January 26, 2009. (D.C. Doc. 20.)

R.H. moved to continue the dispositional hearing and the hearing was reset for March 10, 2009. (D.C. Doc. 24.) Prior to the dispositional hearing, on March 6, 2009, DPHHS filed a Petition to Terminate Parental Rights. (D.C. Doc. 26.) In its petition to terminate, DPHHS requested that the district court make a finding that reasonable efforts were not required. The district court issued an order

vacating the March 10, 2009 disposition hearing, set the termination hearing for May 29, 2009, and ordered that

> reasonable efforts to reunify are not possible due to the serious danger of continued abuse and neglect, and in part based on the adjudication of the prior abuse and neglect. No further efforts for reunification with respect to the parents and the youth are necessary or in the best interest of the youth pending a hearing on the petition in this matter.

(D.C. Doc. 27.)

The termination hearing was continued twice, once at the request of A.G. due to DPHHS's failure to timely provide discovery documentation and once by R.H. (D.C. Docs. 46, 66.) R.H. was unable to contact A.G. to determine her position on the motion and the court issued an order prior to her ability to respond.

The termination hearing was held on October 9, 2009 and November 5, 2009. Testimony was provided by the child protection specialist, CASA, medical providers and the parents.

Dr. Mark Schulein provided well-child checks for T.H. on July 25, 2008, September 26, 2008 and November 14, 2008. (October 9, 2009 Hearing Transcript (10/9/09 Tr.) at 114.) T.H. did not exhibit discomfort during those visits and was not particularly fussy. (10/9/09 Tr. at 118.) Dr. Schulein testified that T.H. appeared to be a healthy baby, although there was some concern at her November 14, 2008 visit that T.H. had "fallen off her growth parameters." (10/9/09 Tr. at

125.) In each of the visits the parents asked questions and seemed concerned about T.H.'s wellbeing. (10/9/09 Tr. at 127.)

Dr. Jeffery Prince, pediatric radiologist, testified to the estimated age of the injuries. He believed the rib injuries to be three weeks old, the clavicle injury to be between two and four weeks old and femur injury to be between ten and fourteen days old from December 1, 2009. (10/9/09 Tr. at 136.) Dr. Prince also reviewed T.H.'s CT scan and found it to be normal. (10/9/09 Tr. at 151.)

Dr. Peggy O'Hara treated T.H. in the emergency room and after her discharge. Dr. O'Hara testified that she subsequently ordered an MRI for T.H., which showed no signs of damage. T.H. also saw an ophthalmologist, whose exam revealed no retinal hemorrhaging. (10/9/09 Tr. at 176-77.) Dr. O'Hara testified that she believed the injuries to be non-accidental trauma and that the pain of the fractured femur would have been obvious to caregivers. (November 5, 2009 Hearing Transcript (11/5/09 Tr.) at 262.) She further testified that A.G. was present at the hospital continuously and, beyond her initial encounter with A.G., A.G. appeared to be calm and attentive to T.H. (11/5/09 Tr. at 263.)

Dr. James Reynolds, clinical geneticist and pediatrician, testified that the injuries were not consistent with any genetic disorder. (10/9/09 Tr. at 192.)

Dr. Karen Mielke, DPHHS' expert in pediatrics and abuse and neglect, testified that she believed the injuries were non-accidental and that the delay in seeking medical care constituted medical neglect. (11/5/09 Tr. at 235-36.)

Jacqui Poe, child protection specialist, testified that she believed that if T.H. was returned home she would be in danger of abuse and neglect "because the parents did it, multiple times, and they did not seek medical care for her and they hid it." (11/5/09 Tr. at 299.) Poe testified that she felt the parents did not meet T.H.'s medical needs because they delayed in seeking treatment and did not meet her emotional needs because they let her suffer. (11/5/09 Tr. at 300-01.) Poe further testified that she couldn't do a treatment plan so long as the parents state they have done nothing wrong. (11/5/09 Tr. at 303.) She did not offer any services to the parents, did not required they take any steps towards addressing the problems that led to DPHHS involvement, and only asked that they come to visits two times per week. (11/5/09 Tr. at 307-08.)

Both parents testified that they voluntarily attended parenting classes and wanted to engage in counseling or evaluations but could not afford the cost. (11/5/09 Tr. at 335, 369.) Both parents denied causing the injuries to T.H. A.G. was adamant that she did not know how T.H. was injured but testified that, if she did know, she would have disclosed that information. (11/5/09 Tr. at 372.)

The district court issued an order terminating the parental rights of both parents on February 2, 2010. (D.C. Doc. 90.)

A.G. filed a timely notice of appeal.

STANDARD OF REVIEW

The Supreme Court reviews constitutional issues of due process as a question of law. Thus this Court's review is plenary. *In re A.R.*, 2004 MT 22, ¶ 8, 319 Mont. 340, 83 P.3d 1287, *In re the Mental Health of K.G.F.*, 2001 MT 140, ¶ 17, 306 Mont. 1, 29 P.3d 485.

A natural parent's rights to care and custody of a child is a fundamental liberty interest which must be protected by fundamentally fair procedures. *In re A.T.*, 2003 MT 154, ¶ 10, 316 Mont. 255, 70 P.3d 1247. Proceedings involving the termination of the parent-child relationship must meet due process requisites guaranteed by the Montana and United States Constitution. Fundamental fairness and due process require that a parent not be placed at an unfair disadvantage during the termination proceedings. *In re A.S.*, 2004 MT 62, ¶ 12, 320 Mont. 268, 87 P.3d 408.

The decision to terminate parental rights by the district court is reviewed for an abuse of discretion. In determining an abuse of discretion, the Supreme Court should look to see if the district court "acted arbitrarily, without employment of conscientious judgment, or exceeded the bounds of reason resulting in substantial

injustice." A parent's right to the care and custody of a child is a fundamental liberty interest and must be protected by fundamentally fair procedures. *In re K.J.B.*, 2007 MT 216, ¶ 22, 339 Mont. 28, 168 P.3d 629, *In re V.F.A.*, 2005 MT 76, ¶ 6, 326 Mont. 383, 109 P.3d 749.

Dependent/neglect cases require that the district court make specific findings. Those findings are reviewed by this Court to determine if they are clearly erroneous. Findings of fact are clearly erroneous if they are not support by substantial evidence; if the district court misapprehended the effect of the evidence; or, even if substantial evidence exists and the effect of the evidence has not been misapprehended, if this Court is left with a definite and firm conviction that the district court made a mistake. *In re M.W. and C.S.*, 2001 MT 78, ¶ 3, 305 Mont. 80, 23 P.3d 206.

SUMMARY OF THE ARGUMENT

A.G.'s right to fundamentally fair procedures was violated when the district court failed to strictly follow statutory requirements. The failure of the district court to hold an adjudicatory hearing that met the requirements of Mont. Code Ann. § 41-3-437, its failure to issue a written order of adjudication and the failure to have a dispositional hearing violated A.G.'s due process rights. Moreover, the district court's determination that reunification efforts were not necessary in the absence of a hearing is grounds for reversal. Finally, the district court erred in

terminating the parental rights of A.G. The findings upon which the district court terminated A.G.'s parental rights are insufficient and not supported by sufficient evidence in the record.

ARGUMENT

I. THE FAILURE OF THE DISTRICT COURT TO STRICTLY FOLLOW STATUTORY REQUIREMENTS VIOLATED A.G.'S DUE PROCESS RIGHTS.

Montana has long recognized that there must be "fundamentally fair procedures" to protect parent's constitutional liberty interest in parenting their child. *In re K.J.B.*, ¶ 41; *In re A.J.E.*, 2006 MT 41, ¶ 21, 331 Mont. 198, 130 P.3d 612; *In re T.H.*, 2005 MT 237, ¶ 21, 328 Mont. 428, 121 P.3d 541; *In re V.F.A.*, ¶ 6. "A natural parent's right to care . . . of a child is a fundamental liberty interest, which must be protected. . . ." *In re B.N.Y.*, 2006 MT 34, ¶ 16, 331 Mont. 145, 130 P.2d 594.

It is well established that strict compliance with the statutory requirement in child abuse and neglect proceedings is required and district courts have been warned repeatedly to follow those requirements. See *In re K.J.B.*, ¶ 46, (citing dissent *In re A.R.*, ¶ 23; *Inquiry into M.M.*, 274 Mont. 166, 174, 906 P.2d 675, 680 (1995); *Matter of F.H.*, 266 Mont. 36, 40, 878 P.2d 890, 893 (1994); *Matter of R.B.*, 217 Mont. 99, 105, 703 P.2d 846, 849 (1985).

A. The District Court Failed to Issue an Adjudicatory Order Which Satisfied Mont. Code Ann. § 41-3-437 and Failed to Hold a Dispositional Hearing.

A youth may be adjudicated if the court determines by a preponderance of the evidence that the child is a youth in need of care. Adjudication must determine the nature of abuse and neglect and establish facts that resulted in state intervention. Mont. Code Ann. § 41-3-437(2). Following the adjudication hearing, the district court is required to make written findings identifying which allegations have been proved or admitted, whether there is a legal basis for continued involvement, and whether reasonable efforts were made to avoid removal. Mont. Code Ann. § 41-3-437(7).

Within twenty days of the adjudicatory hearing, a dispositional hearing must be held. The dispositional hearing must address issues separate and apart from adjudication. Mont. Code Ann. § 41-3-438.

The parties appeared on January 6, 2009, for a show cause hearing on DPHHS's petition for emergency removal and adjudication. At that hearing, counsel for R.H. indicated that R.H. intended to stipulate to the child being a youth in need of care. Counsel for A.G. stated "And I think based on the circumstances, your Honor, my client will also do the same. We'll stipulate, Judge." (1/6/09 Tr. at 3.) No testimony was given; no discussion was had regarding the facts to which the parents agreed; and no discussion of reasonable efforts was had. The district

court stated that based upon the stipulations and its review of the reports filed with the court, it would adjudicate and grant temporary legal custody. The hearing was concluded and no written order was ever issued by the district court as required by Mont. Code Ann. § 41-3-437(7).

The district court issued an order setting a dispositional hearing within the timeframe required. Prior to the hearing, R.H. filed an unopposed motion to continue the hearing due to scheduling conflicts. (D.C. Doc. 23.) The district court continued the dispositional hearing until March 10, 2009, three months after the hearing in which the parents orally agreed to adjudication. (D.C. Doc. 24.) In the interim, DPHHS did not offer a treatment plan to A.G. or engage A.G. in any services to foster reunification.

Shortly before March 10, 2009, DPHHS petitioned to terminate parental rights and requested that the district court determine that reasonable efforts toward reunification were not necessary. (D.C. Doc. 26.) The district court issued an order setting the termination hearing, vacating the dispositional hearing, transferring temporary legal custody to DPHHS and finding that reasonable efforts were not necessary. (D.C. Doc. 27.)

The failure of the district court to strictly follow the statutory requirements violated A.G.'s due process rights and failed to provide her with fundamentally fair procedures. The failure of the district court to issue a written order for

adjudication leaves this Court with the inability to identify which facts or allegations were proven or admitted to by A.G., and subsequently, which facts or allegations led the district court to determine that reasonable efforts were not required.

The failure to have a dispositional hearing is also problematic. This Court has determined that the failure to hold a dispositional hearing separate and apart from the adjudicatory hearing is not necessarily a violation of due process. *In re J.B. & B.B.*, 2006 MT 66, 331 Mont. 407, 133 P.3d 215. In *J.B.*, the parents stipulated to adjudication, temporary legal custody and a treatment plan at the show cause hearing, thus eliminating the need for a dispositional hearing. This case can be distinguished from *J.B.* First, A.G. only stipulated to adjudication and did not stipulate to temporary legal custody. Additionally, the failure to hold a dispositional hearing left the mother in limbo for three months. During that time, DPHHS did not offer A.G. any services, nor did they initiate a treatment plan.

Absent the dispositional hearing and the approval of a treatment plan, A.G. was unable to make progress to address issues that led to the removal of T.H. This delay adversely affected A.G.'s ability to show DPHHS that good cause existed to make reasonable efforts towards reunification, potentially preventing DPHHS from requesting that reasonable efforts not be made. The procedure was fundamentally

flawed from this point forward, with the ultimate repercussion being termination of A.G.'s parental rights.

B. The District Court Was Required to Hold a Hearing on DPPHS' Request for a Finding That Reunification Efforts Were Not Necessary *Prior* to Making Such a Finding.

A district court may make a finding that DPHHS need not make reasonable efforts to provide preservation or reunification efforts if the court determines that the parent has subjected the child to aggravated circumstances. A finding that preservation or reunification services are not necessary must be supported by clear and convincing evidence. Mont. Code Ann. § 41-3-423(2), (4).

> Clear and convincing evidence is simply a requirement that a preponderance of the evidence be definite, clear, and convincing, or that a particular issue must be established by a preponderance of the evidence or by a clear preponderance of the proof. This requirement does not call for unanswerable or conclusive evidence.
> The quantity of proof, to be clear and convincing, is somewhere between the rule in ordinary civil cases and the requirement of criminal procedure— that is, it must be more than a mere preponderance but not beyond a reasonable doubt.

In re E.K., 2001 MT 279, ¶ 32, 307 Mont. 328, 37 P.3d 690.

The district court issued an order on March 9, 2009, stating reasonable efforts were not required. At the time the district court entered this order, no evidentiary hearing had been had nor, had any testimony been given upon which the district court could rely in making this determination. The only information that the district court could have relied upon were the petitions filed by DPPHS

and the reports attached by the child protection worker. These documents were insufficient to support such an important finding. "Statements supporting an initiating petition simply are not evidence upon which a trial court can rely in making findings of fact." *In re D.A.*, 2003 MT 109, ¶ 38, 315 Mont. 340, 68 P.3d 735 (dissenting opinion).

The determination that reasonable efforts are not required is a crucial procedural event in a dependent/neglect case. Because of the impact that such a finding has on the likelihood of termination, the finding must be supported by clear and convincing evidence. At the time that the district court made its determination, the record was absolutely void of any testimony or evidence to support such a finding. Moreover, A.G. was not given the opportunity to present evidence in rebuttal to DPHHS' request. The absence of evidence and the inability of A.G. to provide evidence in opposition to DPHHS' request violated her due process rights and cannot be said to be fundamentally fair.

Additionally, the determination of the district court that reasonable efforts were not required adversely impacted A.G.'s ability to overcome the petition to terminate. Although A.G. enrolled in parenting classes and was consistent in her visits, she was unable to afford counseling or other services without the assistance of DPHHS. Without the assistance of professionals, A.G. was unable to

demonstrate to DPPHS or the district court that she was capable of addressing and resolving the issues that led to DPPHS' involvement.

The determination to not provide services is fatal to parental rights. The determination to not provide services without a hearing is a fundamentally unfair procedure, which places a parent at an unfair disadvantage. The only way to rectify this fundamental flaw is reversal.

II. THE DISTRICT COURT ABUSED ITS DISCRETION IN TERMINATING A.G.'S PARENTAL RIGHTS.

The district court relied upon Mont. Code Ann. § 41-3-609(1)(d) in terminating A.G.'s parental rights. Section 41-3-609(1)(d) provides that termination may be ordered if clear and convincing evidence exists that the parent has subjected the child to any of the circumstances under § 41-3-423(2)(a) through (e). The district court also relied upon Mont. Code Ann. § 41-3-609(1)(f), which requires a finding that an appropriate court ordered treatment plan has not been successfully complied with and the condition of the parents rendering them unfit is unlikely to change.

Because no treatment plan was ever ordered, Mont. Code Ann. § 41-3-609(1)(f) is applicable.

The district court held that

> the repeated injuries and bone fracture of T.H. during her first four and one-half months of life, the severe pain that T.H. endured from these injuries, the failure of the Mother and Father to timely seek

> medical attention for the injuries, and subjecting T.H. to a failure to thrive environment are aggravated circumstances which constitute chronic abuse and chronic severe neglect of T.H. on the part of Mother and Father.

(D.C. Doc. 90 at 12.) A.G. argues that there was insufficient evidence presented at the termination hearing to support a finding of medical neglect and failure to thrive. Even assuming that there was sufficient evidence supporting those findings, there was not clear and convincing evidence supporting a determination those actions or inactions constituted aggravated circumstances of chronic abuse and neglect.

Findings of fact are clearly erroneous if they are not support by substantial evidence; if the district court misapprehended the effect of the evidence; or, even if substantial evidence exists and the effect of the evidence has not been misapprehended, if this Court is left with a definite and firm conviction that the district court made a mistake. *In re M.W.*, ¶ 3.

A.G. does not dispute that T.H. suffered from four bone fractures of varying ages, nor does she dispute the seriousness of these injuries. She disputes the findings that she caused the injuries, should have recognized the injuries and sought medical care earlier.

It is undisputed that T.H. was seen at well child checks on July 25, 2009, September 26, 2009 and November 14, 2009. At each of those visits, Dr. Schulein testified that T.H. appeared to be well taken care of. Although he identified a

concern about T.H.'s weight at the November 14, 2009 visit, he did not identify T.H. as a failure to thrive baby. Dr. Schulein saw T.H. consistently from birth until her removal and had no significant concerns. The district court seemingly ignored Dr. Schulein's statements that besides her recent weight drop off, T.H. appeared to be happy, healthy and not in distress. Dr. Schulein was the one medical provider who had seen T.H. most recently and most frequently prior to her admission to the hospital.

The district court concluded that A.G. delayed in seeking medical care for T.G. because she wanted to hide the injuries. There is no concrete evidence that A.G. was the cause of the injuries or that she was hiding information about the injuries. If A.G. wanted to hide the injuries, it would have been counterintuitive to take T.H. to the emergency room. The opinions of Poe, Dr. O'Hara and Dr. Meilke, that A.G. harmed or was willfully not disclosing the harm T.H. suffered were based on speculation and the absence of evidence.

A.G. disputes that she delayed in seeking medical treatment for T.H. A.G., R.H. and T.H.'s grandmother all testified that A.G. first noticed T.H. have discomfort with her leg around 11:30 pm Saturday and took her to the emergency room Monday morning around 9:30 am. (10/9/09 Tr. at 12; 11/5/09 at 327, 364.) This is less than 48 hours with a non-life threatening injury. Both parents testified

that T.H. was not overly fussy in the days leading to taking her to the emergency room and they had no reason to believe that she was in significant pain.

This Court can determine that the findings are clearly erroneous if it is left with the definite and firm conviction that the district court made a mistake. The mistake lies in the fact that it was not proven with clear and convincing evidence that A.G. caused injury or intentionally withheld medical treatment for T.H. The injuries to T.H. were significant and should not be ignored. However, balancing the significance of the injuries to T.H. with the inability of DPPHS to prove that A.G. was responsible for those injuries or knowingly withheld treatment should have resulted in DPHHS offering a treatment plan to A.G. and providing her the opportunity to prove that she could protect and care for T.H. Instead, the absence of evidence resulted in the termination of A.G.'s parental rights. Here, the district court made a mistake.

CONCLUSION

The proceedings in the matter were fundamentally flawed from nearly the outset. The adjudication hearing did not comply with statutory requirements and no adjudicatory order was issued. No dispositional hearing was held, leaving A.G. without a treatment plan or any meaningful way to show DPPHS or the district court that she was invested in the safety and wellbeing of T.H. The most significant offense to A.G.'s due process was the failure of the district court to hold

an evidentiary hearing before ordering that reasonable efforts need not be pursued. Without the adjudicatory hearing or an evidentiary hearing, the district court was without sufficient evidence to make such a significant determination. Finally, the district erred in terminating A.G.'s parental rights in the absence of clear and convincing evidence that she caused T.H.'s injuries or knowingly withheld medical treatment.

Respectfully submitted this 13th day of April, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing Brief of Appellant to be mailed to:

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Copy to A.G. (mother)

DATED: 4/13/2010 Sarah L Brader

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 10,000 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

Joslyn Hunt
for ELIZABETH THOMAS